Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-349

HAROLD J. GARMANY, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner in the above styled and numbered cause respectfully prays that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered on July 6, 1976, which affirmed his conviction of the offense of conspiracy to possess marihuana with intent to distribute it.

THE OPINION BELOW

The Court of Appeals made summary disposition, without written opinion, of Petitioner's appeal in that Court.

JURISDICTION

Judgment of conviction against Petitioner was entered by the District Court on November 24, 1975 and affirmed by the Court of Appeals on July 6, 1976. Petitioner's motion for rehearing in that Court was denied on August 9, 1976.

Petitioner invokes this Court's certiorari jurisdiction conferred by 28 U.S.C. Sec. 1254 (1). Filing of this petition was accomplished within 30 days from date of entry of order of the Court of Appeals denying the motion for rehearing and therefore was timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth Amendment and the Due Process Clause of the Fifth Amendment.

QUESTION PRESENTED FOR REVIEW

Whether the effect of the affirmance by the Court of Appeals was to decide, in a way in conflict with the decision of this Court in *Preston v. United States,* 376 U.S. 364 (1964), the federal question whether Petitioner's Fourth Amendment rights were violated by the trial court's overruling Petitioner's motion to suppress and admitting into evidence the incriminating fruits yielded by the warrantless search which federal officers made of the flight bag they took from the trunk of Petitioner's rented car at a time when both he and the car were in the custody and control of the officers at the D.E.A. office and at a time when the officers had no probable cause for belief that contraband was in the trunk of the car or in any bag in the trunk of the car.

STATEMENT OF THE CASE

Co-defendants Brown and Bravo were observed by federal officers making a transfer of marihuana from an Oldsmobile driven by Bravo to a trailer. After the transfer was completed the officers arrested Brown and Bravo. At the same time they also arrested Petitioner, who was about 50 feet away standing in front of a motel by the side of a car he had rented. Shortly before the transfer of marihuana was effected Brown had been a passenger in that car.

The officers took the rented car to the D.E.A. office. They also took Petitioner there. Thereafter, at a time when both he and the car were in custody the officers made a warrantless search of the trunk of the car and of a flight bag they found therein. In the flight bag they found a note (Gov. Exhibit #19) which indicated circumstantially that Petitioner had been dealing in marihuana (R. 238, 409).

REASONS FOR GRANTING THE WRIT

The evidence shows, without dispute, that the incriminating note the officers found in the flight bag was fruit of a warrantless search they made of that bag after they removed it from the trunk of the rented car following their driving that car to the D.E.A. office. The evidence also shows, without dispute, that the officers had no probable cause for belief that contraband or weapons were in the trunk of the rented car or in a flight bag found in that trunk. The evidence also shows, without dispute, that the rented car was not subject to seizure and forfeiture, there being no marihuana or other contraband shown by the evidence to have been connected with that car.

The existence of these undisputed facts operates to distinguish and make inapplicable the cases the trial court relied on as basis for overruling the motion to suppress which Petitioner urged and the trial court overruled (R. 207-231), such cases being as follows: *Harris v. United States,* 390 U.S. 234 (1968); *Cooper v. California,* 386 U.S. 58 (1967); *United States v. Soriano,* 497 F.2d 147 (5th Cir. 1974); and *United States v. Davis,* 496 F.2d 1026 (5th Cir. 1974).

Such undisputed facts operate instead to make applicable in Petitioner's favor the decision of this Court rendered in *Preston v. United States,* 376 U.S. 364 (1964). In that case officers after arresting defendants and taking them to the police station, towed their car to the police garage and there subjected it to warrantless search despite the fact the officers had no probable cause for belief that the car contained contraband. This Court concluded that the search was too remote in time and place to have been made as incidental to the arrest and could not otherwise be justified as being reasonable under the Fourth Amendment. The principle applied by this Court in arriving at that conclusion applies equally as basis for a similar conclusion here.

Wherefore, premises considered, Petitioner respectfully submits that the effect of the affirmance by the Court of Appeals was to decide, in a way in conflict with the decision of this Court in *Preston,* the federal question whether Petitioner's Fourth Amendment rights were violated by the trial court ruling overruling the motion to suppress and admitting into evidence the incriminating fruits yielded by the warrantless search the officers made of the flight bag they took from the trunk of Petitioner's rented car at a time when both he and the car were in the custody and control of the officers at the D.E.A. office.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Percy Foreman

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CERTIFICATE OF SERVICE

I certify that, as required by Rule 33, as amended, I have duly served the foregoing Petition for Certiorari by mailing, with first class airmail postage prepaid, three printed copies of such petition to the Solicitor General, Department of Justice, Washington, D.C., 20520, and three printed copies of such petition to Hon. James R. Gough, Assistant U.S. Attorney, P.O. Box 61129, Houston, Texas 77208, on this the 26th day of August, 1976.

Percy Foreman

PERCY FOREMAN

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4457

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD JERRY GARMANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(August 9, 1976)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4457
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD J. GARMANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(July 6, 1976)

BEFORE BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Issued as Mandate: August 17, 1976

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409 Part I

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966